

IN THE  
**United States Circuit Court  
of Appeals** ✓  
**For the Ninth Circuit**

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J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON,  
and FRED D. JACKSON,

*Appellants,*

*vs.*

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA  
BARBARA, HORACE P. HOEFER, PETER DAVIDSON,  
CATHERINE DAVIDSON, *and* GEORGE GIOVANOLA,  
Trustee in Bankruptcy, of the Estate of Mortgage  
Securities, Inc., of Santa Barbara, a Corporation,  
Bankrupt,

*Appellees,*

*and*

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON,  
and FRED D. JACKSON,

*Appellants,*

*vs.*

THOMAS J. SMITHERAM, E. W. SQUIER, *and* J. F. GOUX,  
*Appellees,*

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APPELLANT'S OPENING BRIEF  
Upon Appeals from the District Court of the  
United States for the Southern District  
of California, Central Division

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PAUL P. O'BRIEN,

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No. 9270

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Trustee in Bankruptcy, of the Estate of Mortgage  
Securities, Inc., of Santa Barbara, a Corporation,  
Bankrupt,

*Appellees,*

*and*

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON,  
and FRED D. JACKSON,

*Appellants,*

*vs.*

THOMAS J. SMITHERAM, E. W. SQUIER, *and* J. F. GOUX,

*Appellees,*

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**Appellant's Opening Brief**

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STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING THE BASIS UPON WHICH IT  
IS CONTENDED THAT THE DISTRICT

COURT HAD JURISDICTION AND THAT  
THIS COURT HAS JURISDICTION UPON  
APPEAL TO REVIEW THE JUDGMENTS,  
DECREES, OR ORDERS IN QUESTION.

This case arises in the District Court of the United States, Southern District of California, Central Division, sitting as a Court of Bankruptcy. On May 9th, 1938, an involuntary petition in bankruptcy was filed against Mortgage Securities Inc. of Santa Barbara, a corporation, in the said District Court by the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson, Appellees herein. (Transcript of Record, pages 5 to 16). On June 1st, 1938, Mortgage Securities Inc. of Santa Barbara, a corporation, was adjudicated bankrupt and a reference made to Hugh J. Weldon, Referee in Bankruptcy, Santa Barbara, California. (Transcript of Record, pages 16 and 17).

On April 20th, 1939, Appellants, as creditors and stockholders of Mortgage Securities Inc. of Santa Barbara, a corporation, filed in the said District Court a petition for an order vacating the adjudication of bankruptcy. (Transcript of Record, pages 17 to 44). An answer to this petition was filed on June 5th, 1939, by the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson, Appellees and original petitioners in the involuntary petition in bankruptcy. (Transcript of Record, pages 70 to 74). In addition thereto, George Giovanola, as Trustee

in Bankruptcy appointed by the said Hugh J. Weldon, Referee in Bankruptcy to whom the bankruptcy matter had been referred, filed a motion to dismiss the petition of the Appellants for an order vacating the adjudication in bankruptcy. (Transcript of Record, pages 61 to 65).

On May 23rd, 1939, Thomas J. Smitheram, E. W. Squier and J. F. Goux, Appellees herein, filed in the said District Court a petition praying to be joined as intervening petitioning creditors for the adjudication of Mortgage Securities Inc. of Santa Barbara as a bankrupt, to supplement the creditors named in the original petition in bankruptcy, and praying that the petition of the Appellants for an order vacating the original adjudication in bankruptcy be denied. (Transcript of Record, pages 41 to 61). To this petition, the Appellants on June 5th, 1939, filed an answer. (Transcript of Record, pages 65 to 74).

The petition of the Appellants for an order vacating the adjudication in bankruptcy and the petition of Thomas J. Smitheram, E. W. Squier and J. F. Goux, Appellees, to be joined as intervening creditors for the adjudication of Mortgage Securities Inc. of Santa Barbara as a bankrupt, came on for hearing and were argued together on May 29th, 1939. Subsequently thereto, the said District Court made its order denying the petition of the Appellants to vacate the order of adjudication, and made its order allowing the intervention of Appellees Thomas J. Smitheram, E. W. Squier, and J. F. Goux and joining them as petitioning creditors in the original

involuntary petition in bankruptcy. (Transcript of Record, pages 75 to 78). Appellants have appealed from both of such orders.

The District Court of the United States, Southern District of California, Central Division, had original jurisdiction of the proceedings, as initiated by the filing of the involuntary petition in bankruptcy, by reason of being a Court of Bankruptcy as defined and created by the Bankruptcy Act of the United States, Sections 1 and 2 thereof.

The United States Circuit Court of Appeals for the Ninth District has jurisdiction upon appeal to review the orders in question, by reason of being invested with appellate jurisdiction from the said District Court as a Court of Bankruptcy. The instant matter being a proceeding in bankruptcy, jurisdiction of the appeal is with this Court. (Bankruptcy Act, Section 24).

The jurisdiction of this Court to entertain the appeals also rests upon the following documents, filed in the instance of the appeal from each of the said orders of said District Court:

Notice of Appeal (Transcript of Record, pages 78 and 79.)

Notice of Appeal (Transcript of Record, pages 85 and 86.)

Assignment of Errors (Transcript of Record, pages 88 and 89.)

Assignment of Errors (Transcript of Record, pages 81 and 82.)

Citation (Transcript of Record, pages 2 and 3.)

Citation (Transcript of Record, pages 4 and 5.)

Order Allowing Appeal (Transcript of Record, page 81.)

Order Allowing Appeal (Transcript of Record, page 88.)

Petition for Appeal (Transcript of Record, pages 80 and 81.)

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Designation of Record,

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Statement of Points,

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Statement of Points,

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Statement of Points,

Circuit Court. (Transcript of Record, pages 131 to 135.)

Statement of Points,  
Circuit Court. (Transcript of Record, pages  
137 to 140.)

## STATEMENT OF THE CASE

Mortgage Securities Inc. of Santa Barbara is a California Corporation. Prior to 1931, this Corporation became indebted to the First National Trust and Savings Bank of Santa Barbara in the principal sum of \$50,000.00, plus interest, and to the County National Bank and Trust Company of Santa Barbara in the principal sum of \$30,000.00, plus interest.

Horace P. Hoefer, and Peter Davidson and Catherine Davidson, Appellees herein, were stockholders of Mortgage Securities Inc. of Santa Barbara. Prior to any of the instant proceedings, the First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara, for the purpose of enforcing payment of the indebtedness of Mortgage Securities Inc. of Santa Barbara from the stockholders of such Corporation, assigned their claims against the Corporation to G. Virginia Kaysser. The said G. Virginia Kaysser thereupon instituted an action in the Justice's Court of the Second Judicial Township, County of Santa Barbara, State of California, against various stockholders of Mortgage Securities Inc. of Santa Barbara, including Horace P. Hoefer, and Peter Davidson and Catherine Davidson, seeking to collect from such stockholders the amount of their proportionate liability for payment of the claim of such said Banks against

Mortgage Securities Inc. of Santa Barbara. The said Horace P. Hoefer thereupon paid to the First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara the sum of \$296.00 in payment of his liability as a stockholder of the Mortgage Securities Inc. of Santa Barbara for the proportionate payment of such creditor claims. The said Peter Davidson and Catherine Davidson thereupon paid to the said First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara the sum of \$555.00 in payment of their liability as stockholders of said Mortgage Securities Inc. of Santa Barbara for the proportionate payment of such said creditor claims. By reason of such payments the said Horace P. Hoefer and Peter Davidson and Catherine Davidson claimed to be subrogated, to the extent of such payments of \$296.00 and \$555.00 respectively, to the claims of the said First National Trust and Savings Bank of Santa Barbara and County National Bank and Trust Company of Santa Barbara against Mortgage Securities Inc. of Santa Barbara, basing their right and claim of subrogation upon the provisions of Section 322a of the Code of Civil Procedure of the State of California. Section 322a of the Code of Civil Procedure of the State of California provides that any shareholder who because of his proportionate stockholder's liability has paid any payment in discharge in whole or in part of any debt or liability of a corporation shall be subrogated to the extent of such payment to the claim of the creditors against the corporation. This

statute was added to the Civil Code of the State of California in 1931.

J. H. McCune, one of the Appellants herein, is a creditor of Mortgage Securities Inc. of Santa Barbara, with a provable claim in bankruptcy, being the assignee of the claim of the County National Bank and Trust Company of Santa Barbara hereinabove mentioned. Alice W. Jackson, one of the Appellants herein, is a creditor of Mortgage Securities Inc. of Santa Barbara, with a provable claim in bankruptcy. Fred D. Jackson and Alice P. Jackson, also Appellants herein, are stockholders of Mortgage Securities Inc. of Santa Barbara.

On May 9th, 1938, an involuntary petition in bankruptcy was filed against Mortgage Securities Inc. of Santa Barbara by First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, and Peter Davidson and Catherine Davidson, Appellees herein. The creditor claim of First National Trust and Savings Bank of Santa Barbara, as set forth in said petition in involuntary bankruptcy, arises from the indebtedness of Mortgage Securities Inc. of Santa Barbara to such Bank as hereinabove mentioned. The purported creditor claim of Horace P. Hoefer, as set forth in the involuntary petition in bankruptcy, is a purported claim against Mortgage Securities Inc. of Santa Barbara arising from the purported subrogation of Horace P. Hoefer to a portion of the claims of First National Trust and Savings Bank of Santa Barbara and County National Bank and Trust Company of Santa Barbara as hereinabove described. The

purported claim of Peter Davidson and Catherine Davidson is also a purported subrogated claim as hereinabove described. Upon such involuntary petition in bankruptcy, the Corporation was adjudicated a bankrupt on June 1, 1938, and a reference made to Hugh J. Weldon, Referee in Bankruptcy at Santa Barbara, California. Subsequent thereto on July 1st, 1938, a purported creditors' meeting was called by the said Referee in Bankruptcy and one George Giovanola was purportedly elected Trustee in Bankruptcy of the estate of the said bankrupt. No further proceedings were had until February 2, 1939, on which date the Referee purportedly held an adjourned creditors' meeting for the purpose of examining witnesses. The Appellants appeared at such meeting and made objection to the holding of the meeting and to any further proceedings in the bankruptcy matter on the ground that the involuntary petition in bankruptcy originally filed was insufficient on its face to give the said District Court any jurisdiction to make the adjudication, and that such adjudication and all subsequent proceedings were, therefore, void. The objections were based upon the ground that the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson, being only subrogated claims under the authority of Section 322a of the Civil Code of the State of California, did not constitute provable claims in bankruptcy and that, therefore, the involuntary petition in bankruptcy was insufficient to give the District Court jurisdiction to make the adjudication. The objections of the Appellants were overruled by the Referee

and a subsequent meeting of creditors called on February 21st, 1939, at which time Appellants again appeared and objected to the meeting and any other proceedings in the bankruptcy matter upon the grounds above stated. At both of such meetings the Referee in Bankruptcy and the Appellees were notified by the Appellant that a petition was being prepared and would be presented to the said District Court asking that the adjudication be vacated and set aside.

On April 20, 1939, Appellants filed in the said District Court their petition asking for an order vacating the adjudication in bankruptcy. (Transcript of Record, pages 17 to 44). This petition alleges and sets forth in detail all of the various facts hereinabove set forth and all the facts pertinent to the proceedings, and prays that the adjudication in bankruptcy be set aside by reason of the fact that the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson did not constitute provable claims in bankruptcy, and that, therefore, the original petition in involuntary bankruptcy was insufficient to give the District Court any jurisdiction to make the adjudication in bankruptcy.

On May 23rd, 1939, before the petition of the Appellants to vacate the original adjudication in bankruptcy came on to be heard before the said District Court, Thomas J. Smitheram, E. W. Squier, and J. F. Goux, Appellees herein, filed in said District Court a petition praying to be joined as intervening petitioning creditors for the adjudication of Mortgage Securities Inc. of Santa

Barbara as a bankrupt, to supplement the creditors named in the original petition in bankruptcy, and praying that the petition of the Appellants for an order vacating the original adjudication in bankruptcy be denied. (Transcript of Record, pages 44 to 61). To this petition the Appellants on June 5th, 1939, filed an answer. (Transcript of Record, pages 65 to 74).

The petition of the Appellants for an order vacating the adjudication in bankruptcy and the petition of Thomas J. Smitheram, E. J. Squier and J. F. Goux, Appellees, to be joined as intervening creditors for the adjudication of Mortgage Securities Inc. of Santa Barbara as a bankrupt came on for hearing, and were argued together, on May 29, 1939. The matters came on for hearing at that time, not upon their merits, but for presentation of argument on the various points of law involved. Subsequently thereto, the said District Court made its order denying the petition of the Appellants to vacate the order of adjudication, and made its order allowing the intervention of Appellants Thomas J. Smitheram, E. W. Squier and J. F. Goux, and joining them as petitioning creditors in the original involuntary petition. (Transcript of Record, pages 75 to 78). It is from these orders that appeals were taken by the Appellants, such said appeals having been consolidated by the order of this Court, upon petition and stipulation of all interested parties.

The facts hereinabove set forth appear in the following portions of the record:

Involuntary Petition for Adjudication of Bankruptcy, (Transcript of Record, pages 5 to 17).

Adjudication and Order of Reference, (Transcript of Record, pages 16 and 17).

Petition for Order Vacating Adjudication of Bankruptcy, (Transcript of Record, pages 17 to 44).

Petition of Intervening Creditors, (Transcript of Record, pages 45 to 61).

Reporter's Transcript, (Transcript of Record, pages 97 to 127).

The questions involved in the appeal of the Appellants from the order of the said District Court denying the petition of the Appellants for an order vacating the original adjudication in bankruptcy, and the manner in which such questions are raised, may be briefly stated as follows:

1. Are the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson, original petitioners in the involuntary petition in bankruptcy, provable claims in bankruptcy against Mortgage Securities Inc. of Santa Barbara?

- a. Has a stockholder of a corporation a provable claim in bankruptcy against such corporation as against general creditors of the corporation, when such purported claim is merely a portion of a larger creditor claim against said corporation to which portion the stockholder has been purportedly subrogated by reason of his payment of such portion of said claim by reason of his stockholder's liability for payment of the debts of the corporation?

b. Is Section 322a of the Civil Code of the State of California constitutional as against general creditors of an insolvent corporation?

2. Did the District Court commit error in refusing permission to the Appellants to introduce evidence in support of their petition to vacate the original adjudication in bankruptcy.

3. Did the District Court commit error in entertaining and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the petition of the Appellants to vacate the original adjudication in bankruptcy?

All of these questions are raised in connection with, and will be determinative of, the petition of the Appellants to vacate the original adjudication in bankruptcy, which said petition was denied by the District Court.

The questions involved in the appeal of the Appellants from the order of the District Court allowing Thomas J. Smitheram, E. W. Squier and J. F. Goux to intervene and be joined as intervening petitioning creditors in the petition in involuntary bankruptcy, and the manner in which they are raised, may be briefly stated as follows:

1. Can additional creditors of an alleged bankrupt intervene to join in an involuntary petition in bankruptcy after an involuntary adjudication in bankruptcy has been made upon the original involuntary petition which was filed?

2. If an original involuntary petition in bankruptcy is insufficient on its face to give the District Court jurisdiction to make an adjudication in bankruptcy, can additional creditors intervene and be joined in such original involuntary petition?

3. Does the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux, as intervening creditors, state or set forth sufficient facts upon which an intervention could be granted?

4. Did the District Court commit error in granting the petition of the intervening creditors for leave to intervene and be joined in the original involuntary petition in bankruptcy, when an answer to the petition of the said intervening creditors had been filed and no determination of the issues raised by said answer had been had?

All of these questions are raised in connection with, and will be determinative of, the petition of Thomas J. Smitheram, E. W. Squier and J. F. Goux for permission to intervene and join in the original involuntary petition in bankruptcy, which petition was granted by the said District Court.

### **SPECIFICATION OF ERRORS**

In connection with the appeal from the order of the District Court denying the petition of the Appellants to vacate the original adjudication in bankruptcy, Appellants respectfully urge the following:

1. That the District Court of the United States, Southern District of California, Central Division, committed error in denying the petition of the Appellants for an order vacating the original adjudication in bankruptcy, in that the original involuntary petition in bankruptcy was insufficient on its face to give the said District Court any jurisdiction of the proceeding, and in that the original adjudication of bankruptcy was void and in excess of the jurisdiction of the said District Court.

2. That the said District Court committed error in refusing permission to the Appellants to introduce evidence in support of their petition to vacate the original adjudication in bankruptcy.

3. That the said District Court committed error in entertaining and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the petition of Appellants to vacate the original adjudication in bankruptcy.

In connection with the appeal from the order of the District Court of the United States, Southern District of California, Central Division, granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux to intervene and be joined as petitioning creditors in the original involuntary petition in bankruptcy, the Appellants respectfully urge the following:

1. That the said District Court committed error in granting the said petition of the said Thomas J. Smitheram, E. W. Squier, and J. F. Goux, for leave to intervene and be joined as petitioning creditors in the original

involuntary petition, in that an involuntary adjudication in bankruptcy had already been made and had not been vacated, and in that the original involuntary petition in bankruptcy was insufficient on its face to give the said District Court any jurisdiction of the proceeding.

2. The said District Court committed error in granting the said petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux, prior to the determination of the issues of fact raised by such said petition and by the answer to such said petition filed on behalf of the Appellants. (Petition for leave to intervene appears in Transcript of Record at pages 44 to 61. Answer to such petition by Appellants appears in such said Transcript of Record at pages 65 to 69).

3. The said District Court committed error in granting the said petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene and be joined as petitioning creditors in the original petition in involuntary bankruptcy, in that such said petition fails to state or set forth sufficient facts to establish that the said petitioners had provable claims in bankruptcy or were entitled to intervene in the bankruptcy proceedings.

### ARGUMENT OF THE CASE

Inasmuch as the orders appealed from arise in and from the same bankruptcy proceeding, the appeals therefrom have been consolidated. The argument on the appeals is here presented in two subdivisions, however, for the purpose of clarity. Further necessary facts and de-

tails appear in connection with the argument presented on each point hereinafter set forth.

**“A”**

**ARGUMENT ON THE APPEAL FROM THE ORDER OF THE  
DISTRICT COURT DENYING THE PETITION OF THE  
APPELLANTS FOR AN ORDER VACATING THE  
ADJUDICATION IN BANKRUPTCY**

**I.**

THE PURPORTED CREDITOR CLAIMS OF HORACE P. HOEFER AND PETER DAVIDSON AND CATHERINE DAVIDSON, REPRESENTING TWO OF THE CLAIMS ON WHICH THE INVOLUNTARY PETITION IN BANKRUPTCY WAS BASED, DID NOT CONSTITUTE PROVABLE CLAIMS IN BANKRUPTCY, WHICH FACT APPEARED FROM THE FACE OF THE INVOLUNTARY PETITION, BY REASON OF BEING SUBROGATION CLAIMS TO ONLY A PORTION OF A LARGER CLAIM, AND BY REASON OF THE FACT THAT SECTION 322a OF THE CIVIL CODE OF THE STATE OF CALIFORNIA, FROM WHICH STATUTORY AUTHORITY SUCH SAID CLAIMS ARISE, IS UNCONSTITUTIONAL AS TO GENERAL CREDITORS OF THE INSOLVENT CORPORATION. THE ORIGINAL PETITION IN BANKRUPTCY, NOT BEING BASED ON

PROVABLE CLAIMS IN BANKRUPTCY, WAS INSUFFICIENT ON ITS FACE TO GIVE THE DISTRICT COURT ANY JURISDICTION, AND THE ORDER OF ADJUDICATION WAS, THEREFORE, VOID.

In connection with this point it must be remembered that, as fully set out in the statement of the case hereinabove set forth, the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson are founded upon the payment by such said parties as stockholders of the bankrupt corporation of their proportionate stockholders liability to general creditors of the bankrupt, and the purported subrogation under the provisions of Section 322a of the Civil Code of the State of California to a portion of the claims of such general creditors against the said bankrupt. Both of such claims are portions only of two general claims against the bankrupt, being portions of the claim of the First National Trust and Savings Bank of Santa Barbara, and the claim of J. H. McCune, as assignee of the County National Bank and Trust Company of Santa Barbara. The third claim upon which the said involuntary petition in bankruptcy was based is the claim of the First National Trust and Savings Bank of Santa Barbara. It follows, therefore, that only one direct claim against the bankrupt is included or presented in the involuntary petition in bankruptcy, being the said claim of the First National Trust and Savings Bank of Santa Barbara. The other two claims are merely portions of the claims of the said First National Trust and Savings Bank of Santa Barbara and

J. H. McCune, as assignee of the County National Bank and Trust Company of Santa Barbara. The original petition in involuntary bankruptcy is predicated, therefore, upon one direct claim against the Corporation, and upon two claims which constitute a portion of the direct claim of the First National Trust and Savings Bank of Santa Barbara and a portion of the claim of J. H. McCune as assignee of the County National Bank and Trust Company of Santa Barbara. These facts appear without contradiction in the original involuntary petition in bankruptcy and in the petition of the Appellants for an order vacating the adjudication in bankruptcy. (Transcript of Record, pages 17 to 44, and pages 5 to 17).

An involuntary petition in bankruptcy must be filed by three or more creditors who have provable claims against a person which amount in the aggregate, in excess of the securities held by them, if any, to \$500.00 or over, or if all creditors of such person are less than twelve in number, then the involuntary petition may be filed by one of such creditors.

## AUTHORITY

Bankruptcy Act, Section 59, Subdivision b, as in effect at the time of the filing of the involuntary petition in bankruptcy.

The words of Section 59, Subdivision b, of the Bankruptcy Act in effect at the time of the filing of the involuntary petition in bankruptcy herein, state certain jurisdictional allegations of all involuntary petitions. It is

absolutely necessary that each creditor joining in an involuntary petition should be the owner of a demand or claim provable against the bankrupt within the provisions of the act. The existence of provable claims to the requisite amount is jurisdictional in an involuntary proceeding, and if such jurisdictional defects appear on the face of the record, the adjudication is void.

## AUTHORITIES

In Re: *Howell*, 215 Fed. 1.

In Re: *Crafts-Riordon Shoe Company*, 185 Fed. 931.

In Re: *New York Tunnel Co.*, 166 Fed. 284.

In Re: *St. Lawrence Condensed Milk Corporation*, 9 Fed. 2nd 896.

*Cutler vs. Nu-Gold Ring Co.*, 264 Fed. 836.

*Doty, et al., vs. Mason*, 244 Fed. 587.

In Re: *Farthing*, 202 Fed. 557.

In Re: *Gillette*, 104 Fed. 769.

In Re: *Pickering Lumber Co.*, 1 Fed. Supplement 82.

*Phillips vs. Dreher Shoe Co.*, 112 Fed. 404.

It is a well established rule that Courts of law do not recognize partial assignments of choses in action; and hence a partial assignee has no legal standing to enforce a partial assignment against a debtor who has not consented thereto. This is on the theory that a creditor cannot divide an entire demand into distinct parts and maintain separate actions upon each, since this would subject

the debtor to conditions to which he never assented and involve him in embarrassment and responsibilities never contemplated. A creditor will not be permitted by assignment to enable others to do what he cannot do.

It is also well established that the Bankruptcy Act does not sanction the splitting of a claim into parts in order to create a sufficient number of petitioning creditors to support an involuntary petition in bankruptcy.

### AUTHORITIES

*Stroheim vs. Lewis S. Perry and Whitney Co.*, 175 Fed. 52.

In Re: *Tribelhorn*, 137 Fed. 3.

In Re: *Independent Thread Co.*, 113 Fed. 998.

In Re: *Glory Bottling Company of New York Inc.*, 278 Fed. 625.

In Re: *Lewis S. Perry and Whitney Co.*, 172 Fed. 745.

In the instant case, it must be remembered that the claims of two of the petitioning creditors are portions only of two general claims against the bankrupt. It must further be remembered that one of the general claims against the bankrupt, of which the other two claims are a portion thereof, is the claim of the third petitioning creditor, First National Trust and Savings Bank of Santa Barbara.

It is the position of the Appellant herein that Section 322a of the Civil Code of the State of California, under which statutory authority the purported creditor claims

of Horace P. Hoefer and Peter Davidson and Catherine Davidson arise, is unconstitutional, and the authorities in this respect are hereinafter set forth. If, however, Section 322a of the Civil Code of the State of California is held to be constitutional, the creditors who filed the involuntary petition in bankruptcy, with the exception of the First National Trust and Savings Bank of Santa Barbara, can only be deemed to hold claims against the bankrupt by reason of their purported partial subrogation to certain other creditor claims, which said purported partial subrogation has been brought about by the payment of a purported stockholders' liability to such said other creditors. In other words, the purported provable claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson arise from the fact that they purport to have been partially subrogated to the claims of other creditors of the bankrupt.

In such an instance, such petitioning creditors have only been subrogated to a portion of such other claims against the bankrupt, and stand in the same relative position as exists in the case of other types of subrogation. The situation of a surety who has paid his principal claim or a portion thereof is directly analogous to the position of such said petitioning creditors. The same rules of law should, therefore, be applicable to the purported subrogated claims of the petitioning creditors herein as has been applied in the case of the subrogated claim of a surety.

Section 57, Subdivision i, of the Bankruptcy Act, as in force at the time of the filing of the involuntary petition, provides that whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharges such obligation in whole or in part he shall be subrogated to that extent to the rights of the creditor.

### AUTHORITIES

Section 57, Subdivision i, Bankruptcy Act as in force at the date of the filing of the involuntary petition.

*Swartz vs. Siegel*, 117 Fed. 13.

*Williams vs. U. S. Fidelity Co.*, 236 U. S. 549.

It has been frequently held, however, that the surety may not prove the claim except that the creditor fails to do so.

### AUTHORITIES

*Insley vs. Garside*, 121 Fed. 699.

In Re: *Heyman*, 95 Fed. 800.

In Re: *Hanson and Tyler Auto Company*, 286 Fed. 161.

In Re: *Manhattan Brush Manufacturing Company*, 209 Fed. 997.

*J. S. Farming Co. vs. Brannon*, 263 Fed. 891.

It is also held that a surety who has paid his whole debt which is only a portion of the creditor's claim is not

subrogated to the creditor's right, although the creditor will hold any surplus received above the amount of his claim in trust for the surety.

## AUTHORITIES

*Swartz vs. Fourth National Bank of St. Louis*, 117 Fed. 1.

In Re: *Heyman*, 95 Fed. 800.

In Re: *Manhattan Brush Manufacturing Company*, 209 Fed. 997.

Again it has been held that a surety who has undertaken to pay the creditors of the principal, though not beyond a stated limit, may not share in the assets of the principal by reason of such payment until the debt thus partially protected has been satisfied in full.

## AUTHORITY

*American Surety Company of New York vs. Westinghouse Electric Manufacturing Company*, 296 U. S. 133.

It is also held that a surety who has not paid the entire debt is not entitled to petition for an adjudication in bankruptcy against the principal.

## AUTHORITY

*Phillips vs. Dreher Shoe Company*, 112 Fed. 404.

It would appear, therefore, in the case of Horace P. Hoefer and Peter Davidson and Catherine Davidson, two of the petitioning creditors in the involuntary peti-

tion in bankruptcy, that such persons, having become subrogated only to a portion of other creditors' claims against the Corporation, occupy the same position as an endorser or surety who has partially satisfied the claim against a principal and become subrogated to a creditor's right against the principal. In such an instance, it would appear that the only recourse of the said Horace P. Hofer and the said Peter Davidson and Catherine Davidson would be to have such other creditors, to a portion of whose claims they have become subrogated, prove the claim in bankruptcy. If such other creditors neglected to do so, or failed to do so, then the subrogated parties might prove the creditors' claim in the name of such creditors but not in their own name. The fact that such petitioning creditors have paid a portion of creditors' claims against the bankrupt would not mean that they can prove in bankruptcy for such payment against the bankrupt or the bankrupt's estate. If the original creditors, having proved such claims against the bankrupt, should receive from the bankrupt their entire claim, they would hold an amount equal to that which the said subrogated creditors had paid in trust for such creditors, and would be obligated to reimburse them in such amount. Where, however, a portion only of such creditors' claim has been paid, as in the instant case, by stockholders of the bankrupt, such creditors are entitled to receive the entire dividends of the bankrupt estate under their proof as creditors until the amount paid to them in the shape of dividends from the bankrupt and the amount paid by such stockholders pay the creditors' claim in full.

## AUTHORITIES

*Williams vs. United States Fidelity Company*, 236 U. S. 549.

In Re: *Heyman* 95 Fed. 800.

In Re: *Manhattan Brush Manufacturing Company*, 209 Fed. 997.

*Phillips vs. Dreher Shoe Company*, 112 Fed. 404.

Under the reasoning and authorities hereinabove set forth, Appellants respectfully contend that Horace P. Hoefer, Peter Davidson and Catherine Davidson, did not have provable claims in bankruptcy against the alleged bankrupt corporation.

The Appellants further contend that Section 322a of the Civil Code of the State of California, under which statutory authority the claims of Horace P. Hoefer and Peter Davidson and Catherine Davidson, arise, is unconstitutional, and that the said Horace P. Hoefer and Peter Davidson and Catherine Davidson have not a creditors' claim of any kind against Mortgage Securities Inc. of Santa Barbara, the alleged bankrupt.

Prior to the repeal of Section 322 of the Civil Code of the State of California in 1931, each stockholder of a corporation was, under the terms of such said Section, individually and personally liable for such proportion of its debts and liabilities incurred while he was a stockholder as the amount of stock owned by him bore to the whole of the subscribed stock of the corporation.

It follows, therefore, that prior to the repeal of Section 322 of the Civil Code, each creditor of a corporation had recourse directly against the corporation for the collection of his obligation, and also had recourse against the stockholders of the corporation for payment of their proportionate share of the obligation against the corporation. In the instant case, under the laws as they existed at the time the obligations of the County National Bank and Trust Company of Santa Barbara and the First National Trust and Savings Bank of Santa Barbara were incurred by Mortgage Securities Inc. of Santa Barbara, the said Banks had a right of recourse both against the Corporation and against its stockholders. The right of these creditors had vested in them under the statutes in force at the time the obligations were incurred and remained vested in them until the enactment of Section 322a of the Civil Code of the State of California in 1931.

Prior to the enactment of Section 322a of the Civil Code of the State of California in 1931, a stockholder who paid a statutory stockholders' liability had no recourse against the corporation for repayment.

## AUTHORITIES

Volume 6a, Cal. Juris., pages 1023 and 1024, and cases cited.

By the terms of Section 322a of the Civil Code of the State of California, enacted in 1931, such stockholders become, upon payment of their stockholders' liability, subrogated to a portion of the creditors' claim against the

corporation in proportion to the amount of such creditors' claim paid by such stockholders.

It follows, therefore, that if Section 322a of the Civil Code of the State of California is constitutional and operative as against the general creditors of an insolvent corporation, and allows a stockholder to be subrogated to a portion of a creditors' claim against a corporation when the stockholder pays his proportionate liability on such claim, in the instant case the two petitioning creditors, Horace P. Hoefer and Peter Davidson and Catherine Davidson, would be subrogated to a portion of the claim of such said Banks against the Mortgage Securities Inc. of Santa Barbara. The practical effect of such subrogation would be to allow the subrogated claimants to share in the assets of the Corporation prior to the time the said Banks had received full payment of their claims. In turn, the practical effect of allowing such subrogated creditors to share in the assets of the bankrupt estate before the claims of the said Banks had been paid in full, would be to take from such said Banks the rights which had vested in them prior to the enactment of Section 322a of the Civil Code of the State of California, being the right of recourse against all the assets of the Corporation bankrupt ahead of any right or claim of a stockholder who had paid a proportionate stockholders' liability. The effect would be the same as would exist if pro tanto subrogation were allowable. As is stated in the case of *Columbia Finance and Trust Company vs. Kentucky Union Railroad Company*, 6 Fed. 794, at 796, "If the surety upon making a partial payment, became entitled

to subrogation pro tanto and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and the surety. Such a result would be grossly inequitable."

Accordingly, petitioner contends that Section 322a of the Civil Code, unless it is to be construed to give a subrogated stockholder only the right usually accorded to a surety who is partially subrogated to a creditors' claim, is unconstitutional as against a general creditor of an insolvent corporation, in that it infringes upon and impairs rights which had vested at the time of its enactment, and in that it is violative of the due process clauses and of the contract and ex post facto clauses of the Constitutions of the United States and the State of California.

### AUTHORITIES

Constitution of the United States—Amendment 14.

Constitution of the United States—Article 1, para. 10, Clause 1.

Constitution of California, Article 1, paragraphs 13 and 16.

In conclusion, with respect to this particular point, Appellants contend that the purported creditor claims of Horace P. Hoefer and Peter Davidson and Catherine

Davidson do not constitute provable claims in bankruptcy, and that the original involuntary petition in bankruptcy, predicated partly upon such purported creditor claims, was insufficient on its face to give the District Court any jurisdiction to make the order of adjudication. It is respectfully submitted, therefore, that the original order of adjudication was void, and should have been vacated on motion of the Appellants.

## II.

### THE DISTRICT COURT COMMITTED ERROR IN REFUSING PERMISSION TO THE AP- PELLANTS TO INTRODUCE EVIDENCE IN SUPPORT OF THEIR PETITION TO VACATE THE ORIGINAL ADJUDICATION IN BANKRUPTCY.

The petition of the Appellants for an order vacating the adjudication of bankruptcy was filed in the District Court on April 20, 1939. (Transcript of Record, pages 17 to 44). An answer to this petition was filed on June 5, 1939, by the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, Peter Davidson and Catherine Davidson. (Transcript of Record, pages 70 to 74). In addition thereof, George Giovanola, as Trustee in Bankruptcy appointed by the said Hugh J. Weldon, Referee in Bankruptcy, filed a motion to dismiss the petition of the Appellants for an order vacating the adjudication in bankruptcy. (Transcript of Record, pages 61 to 65). These various matters came on for hearing on May 29, 1939, before the District Court, at which

time argument was presented by all interested parties. Questions of law only were presented and argued, however, at the time of the hearing, and the petitioners were not allowed an opportunity to present any evidence in support of their petition for an order vacating the adjudication in bankruptcy. The petition of the Appellants for an order vacating the adjudication in bankruptcy was uncontraverted by the answer or pleadings on file, except as to the question of the time when the defects in the original involuntary petition in bankruptcy were brought to the attention of the Appellants. Upon this particular point, Appellants requested permission of the Court to file affidavits showing the facts with respect to the time when the defects in the involuntary petition in bankruptcy reached the attention of the Appellants, and permission to file such affidavits was refused by the Court. (Transcript of Record, pages 123 to 125).

It appears, therefore, that although the questions of law with respect to the petition of the Appellants were argued at the time of the hearing, the issues of fact raised by the pleading were not determined, and have not yet been determined. It appears, therefore, that the order denying the petition was entirely premature, that the issues of fact should be determined, and that the District Court was in error in making its order denying the petition of the Appellants prior to a hearing on the issues of fact which had been raised.

## III.

THE DISTRICT COURT COMMITTED ERROR  
IN ENTERTAINING AND GRANTING  
THE MOTION OF GEORGE GIOVANOLA,  
TRUSTEE IN BANKRUPTCY, TO DISMISS  
THE PETITION OF THE APPELLANTS TO  
VACATE THE ORIGINAL ADJUDICATION  
IN BANKRUPTCY.

Subsequent to the filing by the Appellants of their motion to vacate the original adjudication of bankruptcy herein, George Giovanola, purporting to be the Trustee in Bankruptcy of Mortgage Securities Inc. of Santa Barbara, filed a motion to dismiss the petition of the Appellants. (Transcript of Record, pages 61 to 65). This motion was argued on May 29, 1939, in connection with the other matters hereinabove set forth. The motion to dismiss which was presented on behalf of the said purported Trustee raises, of course, only issues of law, if such a motion is allowable at all in proceedings of this kind. There appears to be no authority in law or by rule for such a motion to dismiss, which takes the place of a demurrer, and it is felt that the motion to dismiss was entirely out of order both for that reason, and by reason of the fact that it was made by a Trustee who was appointed under the very order of adjudication which was under attack. It is respectfully contended, therefore, that the motion to dismiss should have been disregarded, and that the District Court committed error in granting such said motion.

If however, the motion to dismiss the petition of the Appellants for an order vacating the original adjudication in bankruptcy, as such motion to dismiss was made by George Giovanola purporting to act as Trustee in Bankruptcy of the said Corporation, was proper and was properly before the Court, Appellants respectfully contend that such motion had no merit and should not have been granted.

The motion to dismiss sets forth four grounds upon which the said George Giovanola, as Trustee, requests such dismissal. (Transcript of Record, pages 61 to 65). These grounds are discussed in the order therein set forth.

(a) The first ground set forth is that it does not appear on the face of the petition for involuntary bankruptcy that the Court did not have the jurisdiction in said proceedings to make its order for adjudication. With respect to this point, a determination of whether or not the claims of Horace P. Hoefer, and Peter Davidson and Catherine Davidson, constituted provable claims in bankruptcy will be conclusive, and no further discussion of that matter is here set forth.

(b) The second ground set forth appears to be based upon the contention that the Appellants had no right to petition for the order vacating the original adjudication in bankruptcy, because such Appellants were only creditors and stockholders of the alleged bankrupt Corporation, and no damage or prejudice appears to exist as to such Appellants by reason of the original adjudication in bankruptcy.

Appellants respectfully submit that both creditors and stockholders, or either of them, may file and maintain a petition to vacate an adjudication in bankruptcy. In the instant case, J. H. McCune and Alice W. Jackson are creditors of the alleged bankrupt Corporation, with provable claims in bankruptcy. Fred D. Jackson and Alice P. Jackson are stockholders of the alleged bankrupt Corporation. Any one or more of them could, therefore file and maintain a petition for an order vacating the original adjudication in bankruptcy.

### AUTHORITIES

In Re: *New York Tunnel Co.*, 166 Fed. 284.

In Re: *Free Gold Mining and Milling Co.*, 2 Fed. Supplement 118.

*Hanna vs. Bricton Manufacturing Company*, 2 Fed. 2nd 139.

In addition thereto, J. H. McCune, one of the Appellants, has an attachment lien on assets of the alleged bankrupt Corporation, and the questions here presented will be determinative of the validity of such attachment lien. The facts and circumstances relative to such attachment lien appear in the original involuntary petition in bankruptcy. (Transcript of Record, pages 5 to 16).

Appellants respectfully submit, therefore, that the petition of the Appellants for an order vacating the original adjudication in bankruptcy was properly brought and maintained.

(c) The last ground presented in the motion of George Giovanola, as Trustee, to dismiss the petition of

the Appellants, is that it appears that the Appellants have been guilty of laches and unreasonable delay. This same point is raised in the answer of the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefer, and Peter Davidson and Catherine Davidson, to the petition of the Appellants. (Transcript of Record, pages 70 to 74).

In the instant case, the Appellants contend that the question of laches is immaterial, by reason of the fact that the original adjudication in bankruptcy is void, and the original petition for involuntary bankruptcy did not confer jurisdiction upon the Court. As a consequence, the adjudication may be attacked at any time, it being the duty of the Court to inquire into the facts of jurisdiction and act accordingly. It is the duty of the Court, when it believes its jurisdiction may have been imposed upon, to inquire into the facts and act in accordance therewith. Lack of jurisdiction is a question the Court should consider whenever and wherever raised.

### AUTHORITIES

In Re: *Ettinger* 76 Fed. 2nd 741.

In Re: *Columbia Real Estate Company*, 101 Fed. 965.

If, however, the question of laches becomes material in any respect, Appellants respectfully submit that it cannot be held that they have been guilty of laches in the instant case, or are estopped from petitioning for the relief sought, because:

1. No proceedings were had in the bankruptcy matter other than the election of the Trustee prior to the time

that the within petitioners presented their objection to the jurisdiction of the Court.

2. No assets have been taken into possession of the Trustee or administered in the bankruptcy proceedings.

3. No rights of third parties have intervened or accrued.

4. Timely objection was raised by the petitioners prior to the filing of the petition to vacate, by way of objection to the jurisdiction of the Court at the purported creditors' meeting.

5. The lack of jurisdiction appears on the face of the involuntary petition in bankruptcy.

With respect to the element of time which passed between the involuntary adjudication in bankruptcy and the filing of the petition of the Appellants to vacate such involuntary adjudication in bankruptcy, the facts which follow are pertinent. The involuntary petition in bankruptcy was filed on May 10, 1938. On June 1st, 1938, the involuntary adjudication in bankruptcy was made. Subsequent thereto, a purported first meeting of creditors was held on July 1st, 1938, at which meeting the said George Giovanola was purportedly elected Trustee of the estate of the said bankrupt. Subsequent to July 1st, 1938, no meeting of creditors and no other proceedings whatsoever were had in the said bankruptcy matter until the 2nd day of February, 1939, on which date the said Referee did purportedly hold an adjourned creditors' meeting for the purpose of examining witnesses. A sub-

sequent meeting was called by the Referee on February 21st, 1939. At both of the said creditors' meetings, being on February 2nd, and February 21st, 1939, the Appellants appeared and presented objection to the holding of the meetings and to any further proceedings in the matter on the ground that the involuntary petition in bankruptcy was insufficient on its face to give the Court jurisdiction. At both of such meetings, the Appellants notified the Referee in Bankruptcy and the Appellees that a petition would be prepared and presented to the Court asking that the original involuntary petition in bankruptcy be vacated.

During all of such period of time, the said Trustee in Bankruptcy had not at any time taken possession of or had in his possession any assets of the alleged bankrupt, and no proceedings of any kind whatsoever or at all had taken place.

The Appellants had no knowledge of the form or contents of the said involuntary petition in bankruptcy until approximately eight months after the filing of the same. Upon obtaining such knowledge, proper objection to the jurisdiction of the Court was made at the first opportunity, and the petition of the Appellants to vacate such adjudication in bankruptcy was filed after the objection of the Appellants to the jurisdiction of the Court had been overruled by the Referee.

All of these various facts appear in the "Petition for Order Vacating Adjudication for Bankruptcy" of the

Appellants, and in the other documents appearing in the record. (Transcript of Record, pages 17 to 44).

It has been held in numerous cases that a motion to vacate an adjudication of bankruptcy must be made promptly. Such a rule appears founded on the doctrine of laches and estoppel, and, in nearly every instance, in reported cases where a petition to vacate an adjudication has been denied for delay in acting, some element of damage, changed condition, acquiescence, acceptance of benefit, etc., has existed. In the instant case such a rule is clearly not applicable. In order to obtain the benefit of the doctrine of laches and estoppel, it must appear that some damage has resulted, or that there has been a change of condition due to such delay, or that there has been an acceptance of benefit. None of these conditions exist in the instant case. The purported Trustee did not at any time or ever have any assets of the alleged bankrupt in his possession; no proceedings whatsoever took place in the bankruptcy action prior to the time that the Appellants asserted their objection to the proceedings; no element of damage or changed condition is present; and the Appellants are not chargeable with having accepted any benefits of the bankruptcy proceedings. Appellants respectfully contend, that even if the doctrine of laches and estoppel could be applicable in the instant case, the circumstances and conditions which appear preclude a denial of the petition of the Appellants for an order vacating the adjudication in bankruptcy.

In the case of *In Re: Ettinger*, 76 Fed. 2nd. 741, a voluntary adjudication in bankruptcy had been made in

August, 1932. In January, 1933, a creditor filed his proof of claim, and in August, 1933, the same creditor moved to vacate the adjudication in bankruptcy. The Trial Court denied the motion, upon the theory that the creditor had recognized the bankruptcy proceedings by a participation therein, had filed a claim therein, and that other rights had intervened during the course of the delay. The Appellate Court reversed the order, holding that it was the duty of the Court when it believes its jurisdiction may have been imposed upon to inquire into the facts and act in accordance therewith. The Appellate Court directly held that lack of jurisdiction was a question the Court should consider wherever and whenever made.

In the case of *In Re: Shell Metal Products Inc.*, 19 Fed. Supplement, 785, an involuntary adjudication had been made, and a motion to vacate the adjudication was denied. The Court held that where a creditor moved to vacate an adjudication on grounds other than those touching the jurisdiction of the Court to make the adjudication, he must make a plausible showing of defenses to the petition and must furnish excuses for not appearing within the statutory time. In the instant case, let it be remembered that the ground upon which the motion to vacate the adjudication was made, directly challenged the jurisdiction of the Court, and Appellants respectfully contend that in such an instance, the doctrine of laches and estoppel do not and cannot preclude the Appellants from the relief sought.

**ARGUMENT ON THE APPEAL FROM THE ORDER OF THE  
DISTRICT COURT ALLOWING THE INTERVENTION OF  
THOMAS J. SMITHERAM, E. W. SQUIER, AND J. F.  
GOUX, AND JOINING THE INTERVENORS IN  
THE ORIGINAL INVOLUNTARY PETITION  
IN BANKRUPTCY.**

**I.**

THE DISTRICT COURT COMMITTED ERROR IN GRANTING THE PETITION OF THOMAS J. SMITHERAM, E. W. SQUIER, AND J. F. GOUX, FOR LEAVE TO INTERVENE AND BE JOINED AS PETITIONING CREDITORS IN THE ORIGINAL INVOLUNTARY PETITION, IN THAT AN INVOLUNTARY ADJUDICATION IN BANKRUPTCY HAD ALREADY BEEN MADE AND HAD NOT BEEN VACATED, AND IN THAT THE ORIGINAL INVOLUNTARY PETITION IN BANKRUPTCY WAS INSUFFICIENT ON ITS FACE TO GIVE THE SAID DISTRICT COURT ANY JURISDICTION OF THE PROCEEDINGS.

In this instance, it must be remembered that an original adjudication in involuntary bankruptcy had been made upon the original petition of involuntary bankruptcy which was filed. The Appellants had also filed their petition for an order vacating and setting aside the orig-

inal adjudication in bankruptcy. Thomas J. Smitheram, E. W. Squier, and J. F. Goux thereupon filed a petition in the District Court to be allowed to intervene and to be joined as petitioning creditors in the original involuntary petition in bankruptcy upon which an adjudication had already been made.

The following authorities support the contention of the Appellants that intervening creditors may not be joined in an involuntary petition in bankruptcy after the adjudication has been made. Section 59, Subdivision f, Bankruptcy Act of 1898, did provide that creditors other than original petitioning creditors may at any time enter their appearance and join in the petition. While the language of the statute is very broad, the authorities appear to restrict the right of a creditor to intervene and join in the petition, restricting such right of intervention to the time prior to the adjudication or the dismissal.

## AUTHORITIES

*Canute Steamship Company vs. Pittsburgh and West Virginia Coal Company*, 263 U. S. 244.

In Re: *Kootenai Motor Co. Inc.*, 41 Fed. 2nd. 399.

In Re: *Jutte and Co.*, 258 Fed. 422.

In Re: *Bedingfield*, 96 Fed. 190.

In Re: *Charlestown Light and Power Co.*, 183 Fed. 160.

In Re: *Plymouth Cordage Co.*, 135 Fed. 1000.

In Re: *Diamond Fuel Co.*, 6 Fed. 2nd. 773.

The case of *Canute Steamship Co. vs. Pittsburgh and West Virginia Coal Co.*, 263 U. S. 244, appears to be conclusive on this point, and the other authorities cited are equally in point. In the *Canute Steamship* case, an involuntary petition in bankruptcy had been filed which was sufficient on its face. Two other creditors joined in the involuntary petition, which was opposed by other creditors. The Supreme Court held that the filing of such a petition, sufficient on its face, gave the bankruptcy court jurisdiction of the proceedings. The Supreme Court further stated "We therefore conclude that where a petition for involuntary bankruptcy is sufficient on its face, alleging that three petitioners are creditors holding provable claims and containing all the averments essential to its maintainance, other creditors having provable claims who intervene in the proceeding and join in the petition at any time during its pendency before an adjudication is made, after as well as before the expiration of four months from the alleged act of bankruptcy, are to be counted at the hearing, etc." The Supreme Court further stated "The right thus conferred is not limited to the four month period after the commission of the act of bankruptcy alleged in the petition, either expressly or by implication; the only limitations as to the point of time being those necessarily implied, that on the one hand the petition cannot be joined in after it has been dismissed and is no longer pending, and that on the other hand, it must be joined in before the adjudication is made."

Appellants respectfully contend, therefore, that, even if the original petition in involuntary bankruptcy is sufficient on its face to allow any intervention, the intervention could not be allowed after the adjudication had been made, unless the adjudication should be vacated.

Appellants further contend, however, that the original petition in involuntary bankruptcy was insufficient on its face to give the District Court any jurisdiction whatsoever, and that for such reason additional creditors cannot be allowed to intervene to join therein. In order to allow an intervention, the original petition must be sufficient on its face. The following authorities support this rule:

#### AUTHORITIES

In Re: *Bedingfield*, 96 Federal, 190.

In Re: *Stein*, 130 Federal, 377.

Appellants respectfully contend, therefore, that the District Court committed error in allowing the said Thomas J. Smitheram, E. W. Squier, and J. F. Goux, to intervene and be joined in the original petition for involuntary bankruptcy.

#### II.

THE DISTRICT COURT COMMITTED ERROR  
IN GRANTING THE PETITION OF THE  
INTERVENING CREDITORS FOR LEAVE  
TO INTERVENE AND BE JOINED IN THE  
ORIGINAL INVOLUNTARY PETITION IN  
BANKRUPTCY, WHEN AN ANSWER TO

THE PETITION OF THE SAID INTERVENING CREDITORS HAD BEEN FILED AND NO DETERMINATION OF THE ISSUES RAISED BY SUCH ANSWER HAD BEEN MADE.

In this connection, let it be noted that the Appellants herein filed in the said District Court an "Answer to Petition of Intervening Creditors," in answer to the said petition filed by Thomas J. Smitheram, E. W. Squier and J. F. Goux for permission to intervene and be joined as petitioning creditors. (Transcript of Record, pages 65 to 69). This answer sets forth facts showing that the Appellants were creditors and stockholders respectively of the said alleged bankrupt, and denies specifically that Thomas J. Smitheram, one of the intervening creditors, had, or at any time did have, a provable claim in bankruptcy against Mortgage Securities Inc. of Santa Barbara. The answer further denied that the said Thomas J. Smitheram at any time was qualified or competent to petition for the adjudication in bankruptcy of the said bankrupt. The answer of the Appellants further set forth the defense that the said petition of the intervening creditors failed to set forth facts upon which the relief could be granted, and failed to state sufficient facts to establish that the petitioners had provable claims in bankruptcy or were entitled to intervene in the said action. The answer of the Appellants further set forth the defense that the District Court had no jurisdiction to grant the petition of the intervening creditors in that a purported adjudication had been made and entered in the

said action, in that the involuntary petition in bankruptcy was insufficient on its face, and in that the said District Court had no jurisdiction of the proceedings.

Prior to the time that the District Court made its order granting the petition of the intervening creditors for leave to intervene and to be joined as creditors in the original involuntary petition in bankruptcy, none of the issues raised by the "Petition of Intervening Creditors" and the "Answer to Petition of Intervening Creditors" had been determined. Appellants respectfully contend that they were entitled to have the issues determined by the District Court prior to the making of the order of the District Court allowing the intervention and allowing such intervening creditors to be joined in the said original involuntary petition.

The scope of the hearing at which the petition of the said intervening creditors came before the Court was limited only to the jurisdictional facts as raised in the answer. As a consequence, numerous allegations of the petition in intervention stand denied by the verified answer, and, inasmuch as no evidence was introduced, the petition in intervention was, and is, unsupported as to the facts at issue.

In the event it was proper for the District Court to make any order in the premises, such an order should have been restricted to granting permission to the proposed interveners to intervene for the purpose of amending the original involuntary petition in bankruptcy, and the answering creditors and stockholders, being the Ap-

pellants in this instance, should have been granted time to answer the original involuntary petition in bankruptcy, as amended by the joining in of these intervening creditors, so that the issues of fact could have been determined. The Appellants are entitled to be accorded an opportunity to have such issues of fact determined either upon the answer which was filed by the Appellants to the petition for leave to intervene, or by way of an answer to the involuntary petition in bankruptcy as amended or supplemented by the intervening creditors. A trial of the issues of fact raised by the answer of the Appellants should be accorded.

The order which was signed by the District Court granted permission to the intervening creditors both to intervene and to join in the original petition in involuntary bankruptcy, but does not set aside the adjudication in bankruptcy for such purpose. If the original involuntary petition was sufficient, then the intervention is, of course, quite useless. If the original involuntary petition was insufficient, then the order of the District Court should adjudge that such said original involuntary petition was insufficient and that the original adjudication be set aside, so that the intervention of such intervening creditors could properly be made.

Appellants respectfully contend, therefore, that the order of the District Court, made before the allegations of the petition for intervention were supported by evidence as to the facts placed at issue, was premature and in error.

## III.

THE DISTRICT COURT COMMITTED ERROR IN GRANTING THE SAID PETITION FOR LEAVE TO INTERVENE, IN THAT SUCH SAID PETITION FAILS TO STATE OR SET FORTH SUFFICIENT FACTS TO ESTABLISH THAT THE SAID PETITIONERS HAD PROVABLE CLAIMS IN BANKRUPTCY, AND IN THAT THE SAID PETITION FAILS TO STATE OR SET FORTH SUFFICIENT FACTS UPON WHICH AN INTERVENTION COULD BE GRANTED.

In this connection it is to be noted that the petition of the said intervening creditors, insofar as the purported creditor claim of E. W. Squier and J. F. Goux is concerned, merely sets forth that the said E. W. Squier and J. F. Goux had filed a proof and claim of unsecured debt with the Referee in Bankruptcy, there being a copy of such claim attached to the petition. The petition thereupon alleges as a conclusion of law that such claim was and is a provable claim in bankruptcy. The same situation exists as to the claim of Thomas J. Smitheram. (Transcript of Record, pages 44 to 58).

The answer of the Appellants questions the sufficiency of the petition as a matter of law in this respect. It is the contention of the Appellants that the existence of provable claims in bankruptcy should be alleged by alleging and setting forth in detail the facts upon which the claims are founded, and that a mere allegation of a con-

clusion of law that the creditors hold provable claims in bankruptcy is not sufficient.

Appellants respectfully contend, therefore, that the "Petition of Intervening Creditors" did not state or set forth facts sufficient to allow an intervention, especially in view of the answer of the Appellants which raised these specific points of fact and law.

### CONCLUSION.

In conclusion, Appellants again respectfully submit that for the reasons above stated the original adjudication of involuntary bankruptcy was void and that the District Court committed error in refusing to vacate such adjudication in bankruptcy; in refusing to allow Appellants to introduce evidence in support of their petition; and in entertaining and granting the motion of the purported Trustee in Bankruptcy to dismiss such said petition.

With respect to the order of the District Court granting the petition for intervention and allowing such intervening creditors to join in the original petition in involuntary bankruptcy, Appellants respectfully submit that such intervention and joining was not allowable, in that the original petition for involuntary bankruptcy was not sufficient on its fact to confer jurisdiction; and in that an adjudication has already been made. Appellants further submit that the District Court committed error in granting such petition for intervention prior to the determination of the issues of fact and law presented in connection therewith; and in granting such petition over

the objection of the Appellants while said petition did not state facts sufficient to allow an intervention.

As hereinabove stated, the petition of Appellants for an order vacating the original adjudication in bankruptcy, the motion of the said Trustee to dismiss such said petition, and the motion of the intervening creditors for permission to intervene and join in the original petition for involuntary bankruptcy, were heard and argued together. On June 27th, 1939, the District Court made its "Memorandum Of Order" granting the petition for intervention, denying the petition of Appellants to vacate the original adjudication, and granting the motion of the said Trustee to dismiss the petition of Appellants on all grounds set forth in the motion to dismiss. (Transcript of Record, page 75).

This "Memorandum Of Order" is of a 'shotgun' type, apparently designed to support the bankruptcy proceedings on all possible grounds. It is, however, of little practical value in determining the points which were involved and which must be decided in order to give the District Court, the Referee in Bankruptcy, and all interested parties, any benefit therefrom, and in order to provide proper authority for the points in question. Unless there is a direct ruling on the said points of law involved, such said points will be necessarily brought up in further proceedings in the same bankruptcy litigation, so that they may be specifically determined.

It is impossible to determine from the orders of the District Court whether or not such District Court de-

terminated the original petition in involuntary bankruptcy to be sufficient on its face to confer jurisdiction, or whether the said District Court intended first to allow the intervention and then to uphold the proceedings upon the theory that the intervention cured any defects in the original petition. It could be concluded that the District Court felt that the original petition for involuntary bankruptcy was insufficient, otherwise there would obviously have been no need to grant the petition in intervention. On the other hand, if the District Court had felt that the original petition for involuntary bankruptcy was insufficient, it would appear that the original adjudication should have been vacated, and the intervention then allowed.

Further too, the order of the District Court denies the petition of the Appellants and thereupon also grants the motion of the said Trustee to dismiss such petition. Obviously, if the petition of the Appellants had been denied, it was not necessary or proper to also dismiss such petition. Further too, it is impossible to determine from the order whether or not the petition of Appellants was denied because the original petition for involuntary bankruptcy was sufficient to confer jurisdiction, or whether such petition was denied upon some other ground set forth in the motion to dismiss.

It is very material and important that these various points be clarified. For instance, it cannot be ascertained from the orders whether or not the subrogation claims of Horace P. Hoefer and Peter Davidson and Catherine

Davidson are held to be provable claims in bankruptcy. Unless this point is determined, it must arise again in the bankruptcy proceedings when such claims are to be allowed or disallowed, and the present proceedings which were relied upon to determine this point offer no precedent. Again as a practical matter, it must be determined whether the original petition in involuntary bankruptcy was held sufficient or whether such petition as joined in by the intervening creditors was held to be sufficient. In the one instance, title to property and displacement of liens dates back to the filing of the original petition in involuntary bankruptcy, and in the other instance the Appellants take the position that title to property and displacement of liens dates from the date of intervention, as being the date the proceedings actually acquired their validity. This point must be determined in this appeal, else it will again rise in the same bankruptcy proceedings with no precedent being established herein.

Appellants respectfully submit, therefore, that the orders of the District Court should be reversed, and that the points herein raised should be definitely determined by this Court.

Respectfully submitted,

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